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Attorney's Fees and the Federal Bad Faith Exception

Introduction

Today, with the rising costs of attorney's fees, the question of who should bear the burden of those fees is likely to be a major issue in every lawsuit, large or small. Each litigant would like to shift the costs of his counsel to the other side if possible, but under the law in the United States as it stands today, this generally cannot be done. However, when a party has been subjected to oppressive tactics by an opponent, justice requires that such party be allowed some measure of compensation. This Note will explore one particular method of compensating a party who is subjected to just such conduct: the federal bad faith exception to the general rule against allowing the recovery of attorney's fees. The first part will be a review of the law governing allowance of fees in this country and in England. This review will be followed by a discussion of the history and evolution of the federal bad faith exception and an analysis of its major characteristics. Judicial adoption of the exception by several states will be catalogued. The Note next examines the statutes of three jurisdictions that allow attorney's fees for bad faith. The statutes will be compared with the federal rule. Finally, the law in California regarding attorney's fees will be discussed along with reasons why California should adopt the federal bad faith exception.

The General Rule and Its Exceptions

Although Alaska,¹ Oregon,² and Washington³ have statutes that

1. ALASKA R. CIV. P. 82. Rule 82(a) also provides a schedule of attorney's fees that may be used in suits for damages, unless the court otherwise directs:

		<u>Contested</u>	<u>Trial</u>	<u>Non- Contested</u>
First	2,000	25%	20%	15%
Next	3,000	20%	15%	12.5%
Next	5,000	15%	12.5%	10%
Over	10,000	10%	7.5%	5%

If no recovery is had, the court may fix a reasonable amount as attorney's fees for the prevailing party.

2. OR. REV. STAT. § 20.010 (1975) states "The measure and mode of compensation of attorneys shall be left to the agreement, express or implied, of the parties; but there may be allowed to the prevailing party in the judgment or decree certain sums by way of indemnity for his attorney fees in maintaining the action or suit, or defense thereto, which allowances are termed costs."

3. WASH. REV. CODE § 4.84.010 (1976), the Washington statute, is similar to the Oregon statute.

allow an award of attorney's fees to a prevailing party in the discretion of the court, most states and the federal courts follow the "American rule."⁴ The rule states that attorney's fees are not ordinarily recoverable as costs or damages in the absence of a statute authorizing the award of fees or of an agreement between the parties providing for them.⁵ The United States Supreme Court first announced this rule in *Arcambel v. Wiseman* in 1796⁶ and has adhered to it up to modern times.⁷ It has become a hard and fast rule of law and is as entrenched as any in the American judicial system.

In England⁸ the practice of awarding attorney's fees to the prevailing party in a lawsuit is an old one. As early as 1275, the law courts of England were authorized to award counsel fees to a successful plaintiff,⁹ and since 1607, they have been able to award attorney's fees to the prevailing defendant also.¹⁰ Today, after litigation of the substantive claims, it is the practice in English courts to conduct a hearing before special "taxing masters" to determine the appropriateness and amount of such an award.¹¹

Some commentators have repeatedly advocated adoption of the English rule in the United States.¹² Others who prefer the American

4. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967); *Campbell v. Maze*, 339 So.2d 202 (Fla. App. 1976) *affirming* 307 So.2d 235; *Strickland v. Williams*, 234 Ga. 752, 218 S.E.2d 8 (1975); *Salvador v. Popaa*, 56 Haw. 111, 530 P.2d 7 (1975); *Kidwell & Heiser v. Fenley*, 96 Idaho 534, 531 P.2d 1179 (1975); *Frost v. Cedar County Bd. of Supervisors*, 163 N.W.2d 432 (Iowa 1968); *Pelican Printing Co. v. Pecot*, 216 So. 2d 153 (La. App. 1968); *Harrison v. Textron, Inc.*, ___ Mass. ___, 328 N.E. 2d 838 (1975); *Bitney v. School Dist. No. 44*, 167 Mont. 129, 535 P.2d 1273 (1975); *Atlas v. Silvan*, 128 N.J. Super. 247, 319 A.2d 758 (1974); *Sorin v. Board of Educ.*, 46 Ohio St. 2d 177, 347 N.E. 2d 527 (1976); *Gaylord v. State ex. rel. Dept. of Highways*, 540 P.2d 558 (Okla. 1975); *Chatham Communications, Inc. v. General Press Corp.*, 463 Pa. 292, 344 A.2d 837 (1975); *Austin Paving Co. v. Cimarron Constr., Inc.*, 511 S.W.2d 417 (Tex. Civ. App. 1974).

5. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

6. 1 U.S. (3 Dall.) 306 (1796).

7. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

8. See 1962 PROCEEDING OF SECTION OF INTERNATIONAL AND COMPARATIVE LAW, A.B.A. Other countries also follow the English practice of awarding counsel fees to the prevailing party.

9. Statute of Glouster, 1278, 6 Edw. 1, c. 1. This statute, which mentioned only "the cost of his writ purchased," was from the beginning liberally construed to include all costs of suit, including attorney's fees.

10. Statute of Westminster, 1606, 4 Jac. 1, c. 3.

11. Solicitor's Act, 1957, 5 & 6 Eliz. 2, c. 27.

12. E.g., Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966) [hereinafter cited as Ehrenzweig]; Greenberger, *The Cost of Justice: An American Problem, An English Solution*, 9 VILL. L. REV. 400 (1964); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?* 49 IOWA L. REV. 75 (1963) [hereinafter cited as Kuenzel].

practice have generally argued that being forced to pay an opponent's counsel fees is a form of penalty and that a litigant should not be penalized for merely defending or prosecuting a lawsuit. They also claim that the poor might be reluctant to bring lawsuits to vindicate their rights if payment of their opponents' attorneys' fees might be one of the penalties for losing.¹³ The burden on judicial administration that might be created by the "time, expense, and difficulties" involved in determining what constitutes a reasonable attorney's fee is also given as a reason for retaining the American rule.¹⁴

Supporters of the English system have not refuted these arguments but have instead stressed the evils of the current rule, including the fact that under it the successful party is never fully compensated because such party must pay counsel fees which may be as much or more than the total recovery in the suit.¹⁵ They also point out that the chance of recovering counsel fees from a losing opponent can create a strong incentive for a lawyer to take on a meritorious case without regard to the client's ability to pay. Such an incentive would greatly increase the number of people, especially the poor, served by the legal profession.¹⁶ Nevertheless, despite the clamor for change, the courts and the legislatures in this country have generally refused to adopt the English practice.¹⁷

Although the courts tend to adhere to the American rule, Congress and many of the state legislatures have provided for attorney's fees by statute when the policy behind the legislation is important enough to encourage enforcement by private litigation.¹⁸ For example, in the Federal Rules of Civil Procedure Congress has expressly allowed recovery of reasonable attorney's fees for abuse of the discovery process.¹⁹

As with all general rules, the courts have used their equity powers to fashion exceptions to the American practice when the interests of

13. *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); *Sands, Attorneys' Fees as Recoverable Costs*, 63 A.B.A.J. 510, 513 (1977).

14. *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

15. Kuenzel, *supra* note 12, at 84.

16. Ehrenzweig, *supra* note 12, at 798.

17. *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

18. *E.g.*, 15 U.S.C. § 15 (1970) (antitrust); 42 U.S.C. § 2000a-3(b) (1970) (public accommodations); 42 U.S.C. § 2000e-5(k) (1970) (equal employment); 42 U.S.C. § 3612(c) (1970) (fair housing); CAL. CODE CIV. PROC. § 1031(c) (West Supp. 1976) (suit for wages); CAL. LAB. CODE §§ 3856, 3860 (West 1971 & Supp. 1977) (worker's compensation). See also The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified in 42 U.S.C.A. § 1988 (Supp. 1977)) (Oct. 19, 1976).

19. FED. R. CIV. P. 26(c) (protective orders); FED. R. CIV. P. 37 (failure to make discovery).

justice have so required,²⁰ and three major exceptions have been developed. The first of the exceptions to the American rule, which is recognized both in the federal system and by the states, is the common fund-substantial benefit exception. This exception applies when a party, at his own expense, brings an action and creates or preserves a fund in which others share. Even if no fund has been created, the exception nonetheless applies if the plaintiff's litigation has conferred a substantial benefit on an identifiable class.²¹ In the exercise of equity jurisdiction, courts may award attorney's fees out of the fund or require contribution by those on whom the benefit has been conferred.²² This exception was one of the two specifically approved in the Supreme Court's most recent decision on attorney's fees in the federal system, *Alyeska Pipeline Service Company v. Wilderness Society*.²³

A second generally recognized exception, which was not one of those mentioned in *Alyeska* but which has ample support in the case law,²⁴ is the prior litigation exception. This exception comes into play when a person is required, because of the wrongful act²⁵ of another, to protect his interests by bringing or defending a lawsuit against a third party. Under these circumstances, in a subsequent

20. Congress itself attempted with the Fee-bill of 1853 to provide a sort of "general exception" to the American rule for federal courts. The bill, embodied in 28 U.S.C. §§ 1920 and 1923 (1970), allows nominal sums (e.g., \$20 for trial or final hearing; \$5 for motion for judgment), called attorney's and proctor's docket fees, to be taxed and recovered as costs. Even though this statute may have been an attempt over 125 years ago to provide for a general attorney's fee statute in derogation of the American rule, it is obviously of no consequence today in the face of counsel fees that run into thousands of dollars. Furthermore, the bill has been held not to interfere with the general equity power of the federal courts to develop more substantial exceptions. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-58 (1975).

21. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Alford v. Citizens & S. Nat'l Bank*, 237 Ga. 194, 226 S.E.2d 905 (1976); *Cassidy v. Lehnhausen*, 25 Ill. App. 3d 1049, 324 N.E.2d 236 (1975); *Amalgamated Meat Cutters, Inc. v. Club 167, Inc.*, — Minn. —, 232 N.W.2d 103 (1975); *Gettings v. City of Elgin*, 16 Or. App. 140, 517 P.2d 686 (1974); *Weiss v. Bruno*, 83 Wash. 2d 911, 523 P.2d 915 (1974).

22. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 396-97 (1970); *Trustees v. Greenough*, 105 U.S. 527, 536 (1881).

23. 421 U.S. 240 (1975).

24. *Canadian Universal Ins. Co. v. Employers' Surplus Lines Ins. Co.*, 325 So.2d 29 (Fla. App. 1976); *Uyemura v. Wick*, — Haw. —, 551 P.2d 171 (1976); *In re State Farm Auto. Ins. Co.*, 50 Mich. App. 71, 212 N.W.2d 821 (1973); *Johnson v. Mercantile Trust Co. Nat'l Ass'n*, 510 S.W.2d 33 (Mo. 1974); *Donnelly v. Young*, 471 S.W.2d 888 (Ct. Civ. App. Tex. 1971); *Manning v. Loidhamer*, 13 Wash. App. 766, 538 P.2d 136 (1975). Federal courts apply the prior litigation exception in diversity suits. See *Mid-Continent Tel. Corp. v. Home Tel. Co.*, 319 F. Supp. 1176 (N.D. Miss. 1970).

25. E.g., as where defendant's breach of contract causes plaintiff to breach its contract with a third party, or where defendant's tortious conduct causes damage for which plaintiff is held responsible. 1 S. SPEISER, ATTORNEYS' FEES, § 13:4 (1973).

action against the person whose wrongful act caused the prior litigation, the party wronged may recover as damages reasonable attorney's fees expended in the prior suit.²⁶

The third judicially created exception to the American rule is the federal bad faith exception, which is also sometimes called the exception for unreasonably obdurate behavior.²⁷ This exception is the second one approved in *Alyeska*. The Supreme Court stressed, however, that Congress had not given the federal judiciary any "roving authority . . . to allow counsel fees as costs or otherwise whenever the courts might deem them warranted"²⁸ and limited the exceptions allowed in the federal system to the bad faith exception and the common fund-substantial benefit exception.²⁹

The Federal Bad Faith Exception

The power to award attorney's fees for bad faith conduct on the part of a litigant originated in the English Court of Chancery around the 11th century. Some commentators have claimed that the power derived from 17 Richard II, c. 6 (1393), which provided that the Chancellor could award damages, in his discretion, against persons who brought vexatious and baseless suits in chancery.³⁰ Others have argued that the power was inherent in the equity courts and did not derive from a statute or any delegated authority.³¹ Whatever the power's source, examination of the old general Orders of the Court shows that the equity courts exercised wide discretion in this area.³²

A review of the English cases shows that attorney's fees were not even then allowed as a matter of course. Chancery only allowed them if the particular facts warranted. The cases fell generally into three categories: (1) where charges of fraud were made but not proved, (2) where the main ground of the suit was vexatious, wanton, or oppressive, and (3) where a fiduciary relation existed and the fiduciary was put to expense in defending an unfounded suit or in administering the trust property.³³

26. *E.g.*, *Uyemura v. Wick*, ___ Haw. ___, 551 P.2d 171, 176 (1976).

27. *E.g.*, *F.D. Rich Co. v. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974).

28. 421 U.S. at 260. The court viewed the Fee-bill of 1853 as governing the allowance of attorney's fees in the federal courts. See note 20 *supra*. As noted previously, however, this statute is, in effect, a reiteration of the American rule in view of its ineffectiveness as a real provision for attorney's fees. Compare 28 U.S.C. § 1923 (1970) with *ALASKA R. Civ. P. 82*. See note 1 *supra*.

29. 421 U.S. at 257-59.

30. *Stallo v. Wagner*, 245 F. 636, 638 (2d Cir. 1917).

31. *Id.*

32. *Andrews v. Barnes*, 39 Ch. D. 133 (1888).

33. *Guardian Trust Co. v. Kansas City S. Ry.*, 28 F.2d 233, 241 (8th Cir. 1928).

The United States courts of equity at the time of their creation by the Judiciary Act of 1789³⁴ were given the power possessed by the English chancery courts at the time of the adoption of the United States Constitution.³⁵ Because the courts of equity in England exercised discretionary power to award attorney's fees against a party for bad faith conduct at that time, these same powers were assumed by the federal equity courts upon their creation. Among these equitable powers is the exercise of the court's conscience to deter frivolous litigation, to punish a party for abuse of the judicial system, and to avoid injustice to innocent litigants. Because these goals represent the purpose of the federal bad faith exception,³⁶ providing for such a remedy as attorney's fees is well within a court's equity powers.³⁷

The early federal cases that developed the exception into its present form restricted its application solely to suits in equity.³⁸ Because the distinction between law and equity in the federal system was abolished by the promulgation of the Federal Rules of Civil Procedure in 1938,³⁹ federal courts have expanded the application of the exception and have not limited it to equity proceedings alone.⁴⁰

The bad faith exception allows a court in the exercise of its equity powers to award attorney's fees to a party when his opponent has acted in bad faith — in a vexatious or wanton manner or for oppressive reasons.⁴¹ If a court finds that a litigant has engaged in such conduct, it may award that portion of the opponent's fees incurred as a result of such conduct.⁴² If the bad faith pervades the whole suit, the guilty party may be adjudged liable for all of the opponent's fees.⁴³

The bad faith exception embraces two types of conduct. The basis for the award may be either in bad faith which induces the litigation or in that which occurs during litigation.⁴⁴

34. Act of Sept. 27, 1789, Ch. 20, 1 Stat. 73.

35. *Fontain v. Ravenel*, 58 U.S. (17 Haw.) 369, 384 (1854).

36. *Hall v. Cole*, 412 U.S. 1, 5 (1973).

37. See notes 30-35 & accompanying text *supra*.

38. See, e.g., *Guardian Trust Co. v. Kansas City S. Ry.*, 28 F.2d 233 (8th Cir. 1928) (fraud); *Gazan v. Vadsco Sales Corp.*, 6 F. Supp. 568 (E.D.N.Y. 1934) (derivative suit).

39. Fed. R. Civ. P. 2.

40. See, e.g., *Vaughan v. Atkinson*, 369 U.S. 527 (1962) (admiralty); *Siegel v. William E. Bookhultz & Sons, Inc.*, 419 F.2d 720 (D.C. Cir. 1969) (breach of insurance contract).

41. *Hall v. Cole*, 412 U.S. 1, 5 (1973).

42. *Signal Delivery Serv., Inc. v. Highway Truck Drivers Local No. 107*, 68 F.R.D. 318, 322 (E.D. Pa. 1975).

43. See, e.g., *Bell v. School Bd.*, 321 F.2d 494 (4th Cir. 1963).

44. *Hall v. Cole*, 412 U.S. 1, 15 (1973). The term "litigation" will be used in this Note to mean the period beginning the moment the complaint is filed to final judgment after appeal.

The first basis for an award of attorney's fees involves situations in which a party has without justification refused to recognize the clear legal rights of another, thereby forcing that person to bring a lawsuit to enforce his rights.⁴⁵ The principal application in the past of this type of bad faith has been in suits brought to vindicate constitutional rights or in suits brought for violation of the civil rights acts.⁴⁶ The scope of the exception is now broader; the exception is applicable any time a defendant has behaved obstinately and has induced another to file a lawsuit against him.⁴⁷

The following three cases illustrate what constitutes bad faith inducing litigation. A standard for determining whether an award is warranted was set out by the Southern District of New York in *Lewis v. Texaco, Inc.*⁴⁸ In that case,⁴⁹ thirty-two seamen agreed to serve on the defendant's vessel, which was to make a coastal voyage from Florida to several Gulf ports and the west coast. The ship, however, did not complete the trip, which ended after only sixteen days. The seamen were discharged and paid wages for the sixteen day period.

The controversy arose out of the seamen's claim for one month's wages pursuant to section 594 of Title 46 of the United States Code.⁵⁰ Section 594 provides that if a seaman is discharged without fault before one month's wages are earned, he is entitled to receive from the ship owner, as compensation, one month's pay in addition to any wages actually earned. Texaco refused to pay the claimed compensation contending that the seamen had waived their rights by signing a release.

45. *Fairley v. Patterson*, 493 F.2d 598, 606 (5th Cir. 1974). The first type of bad faith differs from the prior litigation exception in that under the former, the plaintiff is forced to bring a suit against a party who has shown bad faith, while under the prior litigation exception, no bad faith is involved. The party seeking attorney's fees under the prior litigation exception incurred them in another suit with a third party, which suit was caused by the wrongful act of the party from whom fees are sought.

46. 42 U.S.C. §§ 1981 *et seq.* (1970). The application of the bad faith exception to suits brought under the Civil Rights Acts will not be so important as it was in the past. Recently, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (Supp. 1977)) which permits the court, in its discretion, to allow attorney's fees to successful parties in civil rights suits brought under 42 U.S.C. §§ 1981-1983, 1985-1986, under Title VI of the Civil Rights Act of 1964 and in suits brought by the United States to enforce a violation of the Internal Revenue Code, with the proviso that the United States as a party may not recover costs.

47. See, e.g., *Monroe v. Board of Comm'rs*, 453 F.2d 259 (6th Cir.), *cert. denied*, 406 U.S. 945 (1972); *United States v. Texas*, 495 F.2d 1250 (5th Cir. 1974).

48. 418 F. Supp. 27 (S.D.N.Y. 1976).

49. The facts of the case are set out in *Lewis v. Texaco, Inc.*, 527 F.2d 921 (2d Cir. 1975).

50. 46 U.S.C. § 594 (1970).

The seamen brought suit to recover the amounts they thought were due them under the statute. The lower court found in their favor and awarded them one month's salary along with counsel fees. On appeal, the Second Circuit affirmed on the merits. It held Texaco's refusal to pay unjustified and unsupportable, finding the law "so broad and the solicitude for seamen so plain" that Texaco's contentions as to any claimed releases could not be sustained.⁵¹ The court was unsure of the basis upon which the lower court had placed its award of attorney fees, so it remanded the case to the district court for reconsideration of the issue.

On remand, the district court awarded fees under the exception, finding that Texaco was fully aware of its obligations to pay the seamen and that its refusal "was sheer recalcitrance on its part and an act of bad faith."⁵² Thus, by its unjustified refusal to pay the compensation due knowing it had a duty to do so, Texaco had induced the plaintiffs to file suit to vindicate their rights.

Another case in which attorney's fees were awarded for bad faith conduct that induced litigation was *Bell v. School Board*.⁵³ There, the parents of children attending county schools brought an action to force the board to desegregate the county educational system. The award of attorney's fees was based on the board's long continued pattern of "evasion and obstruction" of desegregated education long after the decision in *Brown v. Board of Education*.⁵⁴ The court found not only that the board refused to take any initiative to desegregate but that it hindered any attempts on the part of the plaintiffs to do so, thus forcing them to bring suit to vindicate their rights.⁵⁵

51. 527 F.2d at 924.

52. 418 F. Supp. at 28.

53. 321 F.2d 494 (4th Cir. 1963).

54. 349 U.S. 294 (1955).

55. 321 F.2d at 500. Although the matter did not arise in *Bell*, whether an award of attorney's fees against a state agency will be allowed is today an unsettled question. *Edelman v. Jordan*, 415 U.S. 651 (1974), held that a suit in federal court by private parties seeking recovery payable from a state treasury is barred by the eleventh amendment which prohibits the states from being sued in federal court without their consent. *Id.* at 663. Subsequently, it was decided in the Sixth Circuit that a federal court does not have the power to award attorney's fees payable out of a state treasury against a state or its officers acting in their official capacities. *Jordon v. Gilligan*, 500 F.2d 701, 709 (6th Cir. 1974). However, the Fourth Circuit in *Thonen v. Jenkins*, 517 F.2d 3 (4th Cir. 1975), refused to read *Edelman* so restrictively and awarded fees against officials. The court cited *Gates v. Collier*, 489 F.2d 298 (5th Cir. 1973), in which the Fifth Circuit concluded, before *Edelman* was decided, that "the award of attorney's fees is not an award of damages against the State, even though funds for payment of the costs may come from the state [treasury]." *Id.* at 302. The Third Circuit, reaching the same result as the Sixth Circuit, interpreted *Edelman* as "closing the door on any money award from a state treasury in any

Finally, *Rolax v. Atlantic Coast Line Railroad*⁵⁶ contained yet another example of conduct that induced litigation in such a manner so as to warrant an award of fees against the defendant. In that case, a labor union was sued by some of its members for racial discrimination. The court noted that the defendant union was a powerful organization as contrasted with the insular impotency of the plaintiff members. Moreover, the union had a duty to protect the plaintiffs' rights and had instead subjected them to arbitrary, oppressive, and discriminatory conduct. Under these circumstances, the court deemed it "fair" for the union to bear the cost of the plaintiffs' attorney's fees.⁵⁷

Although the first type of bad faith involves conduct on the part of a defendant before suit is filed, the second type involves conduct on the part of either party during the litigation itself. Under this part of the exception, attorney's fees may be awarded against plaintiffs for bad faith in instituting a groundless suit and against defendants for asserting a baseless defense. An award can also be made against any party for offering unnecessary petitions and motions or for generally pursuing a course of vexatious conduct that pervades the whole suit.

Several cases have explicitly defined the type of conduct that warrants an award of counsel fees for bad faith during litigation. The Eighth Circuit in one of the early bad faith cases, *Guardian Trust Co. v. Kansas City Southern Railway*,⁵⁸ held the plaintiff accountable for attorney's fees for filing a groundless lawsuit. The court made the award to the defendant Trust Company because it had been brought into court and compelled to defend against charges of fraud that were baseless.⁵⁹ Such a result, reasoned the court, was compelled by the application of equitable principles.⁶⁰

category." *Skehan v. Board of Trustees*, 501 F.2d 31, 42 n.7 (3d Cir. 1974). Despite this split among the circuits, a federal court can, in a suit against a state or one of its agencies or officials, award attorney's fees against defendants in their individual capacities for bad faith if it is found that they personally engaged in the conduct justifying the award. *Hallmark Clinic v. North Carolina Dep't of Human Resources*, 380 F. Supp. 1153, 1159-60 (E.D.N.C. 1974) (relying on provisions of state law).

Sovereign immunity also protects the federal government agencies and officers acting in their official capacities from fee shifting without their consent. *Harrisburg Coalition Against Ruining the Environment v. Volpe*, 381 F. Supp. 893, 899 (M.D. Pa. 1974).

56. 186 F.2d 473 (4th Cir. 1951).

57. *Id.* at 481.

58. 28 F.2d 233 (8th Cir. 1928).

59. *Id.* at 246.

60. *Id.* It should be noted at this point that the defendant in such a bad faith suit would also have a cause of action for malicious prosecution if he could show that the plaintiff instituted suit without probable cause and was actuated by malice. *Bertero v. National General Corp.*, 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184

An award is also justified under this second type whenever a defendant obstinately and unjustifiably poses a baseless defense, thereby forcing the plaintiff to participate in a long, unnecessary trial to prove the defendant's liability. An example of this type of bad faith was seen in *Gates v. Collier*,⁶¹ in which inmates of a state penitentiary brought a class action against Mississippi officials, alleging that the operation and conditions of the prison violated their constitutional rights. From the commencement of the suit, the defendants had strongly denied all constitutional violations. They had adhered to this position unreasonably throughout several long evidentiary hearings in the face of evidence of their clear liability. Their obstinacy in refusing to admit culpability had caused plaintiff's attorney to expend time and money engaging in extensive discovery, interviewing witnesses, and making trips to the penitentiary which he otherwise would not have done. Only when the defendants had seen that it was futile to maintain their groundless defense did they agree to submit the case on a stipulated record.⁶² The *Gates* court further found that the law in the area of prisoner's rights was sufficiently clear and settled so that it was completely unnecessary for the action to have even been brought. Although the court could have based an award against the defendants solely on their bad faith in inducing litigation, it also found bad faith in the defendants' groundlessly prolonging the litigation.⁶³

Bad faith conduct sufficient to justify attorney's fee awards has also been found when either party during litigation offered unnecessary, groundless, vexatious, or oppressive petitions and motions.⁶⁴ In *Baas v. Elliot*,⁶⁵ a teacher brought an action against a college in state court to review the college's denial of tenure and its termination of the teacher's employment. The college removed the case to federal court alleging that because there was a collective bargaining agreement between the college and the plaintiff's union, subject matter jurisdiction existed under the Labor Management Relations Act.⁶⁶ The college then reversed its position and filed an answer, claiming

(1974); *Hudson v. Zumwalt*, 64 Cal. App. 2d 866, 872, 149 P.2d 457, 460 (1944). Attorney's fees and other expenses of litigation would be important elements of damages in such a case. Under the bad faith exception, however, if the only damage suffered by the defendant was the expense of suit (no injury to his business or reputation, for example), then a separate action for malicious prosecution would be unnecessary because the expenses could be recovered in the original suit filed in bad faith.

61. 70 F.R.D. 341 (N.D. Miss. 1976).

62. *Id.* at 343.

63. *Id.* at 344.

64. Local No. 149, UAW v. American Brake Shoe Co., 298 F.2d 212, 214-15 (4th Cir.), cert. denied, 369 U.S. 873 (1962).

65. 71 F.R.D. 693 (E.D.N.Y. 1976).

66. 29 U.S.C. § 185 (1970).

the district court did not have subject matter jurisdiction over the claimed violation of the collective bargaining agreement.

The district court found that the college engaged in such conduct for the sole purpose of receiving the dismissal it could not otherwise obtain in state court. The court said that "[s]uch a frivolous, self-defeating invocation of federal procedure cannot be countenanced."⁶⁷ It found the college's actions unacceptable, awarded attorney's fees for bad faith to the plaintiff, and remanded the case to the state court.⁶⁸

Finally, fees are allowed when a party pursues a vexatious course of conduct throughout the litigation. In *Red School House, Inc. v. Office of Economic Opportunity*,⁶⁹ plaintiffs had brought suit charging the OEO with wrongfully cancelling a grant of funds. The district court, applying the bad faith exception, had allowed plaintiffs attorney's fees because of the obdurate and uncooperative conduct of the OEO during the course of the lawsuit and because of its defiant attitude. The court decided the attorney's fees issue in a separate proceeding. In explaining the rationale for its decision it quoted from the opinion on the merits:

[The OEO's conduct] constituted the most amazing and unacceptable conduct of an agency of the United States that the Court has observed. On occasion, OEO refused to produce witnesses as ordered by the Court, it failed to produce documents as ordered by the Court after representing that it would do so, it resisted all reasonable efforts toward reconciling its differences with the plaintiffs, and certain OEO officials even refused to appear before the Court to attempt to justify such behavior. This conduct, in many circumstances, bordered on the contumacious.⁷⁰

Fees were also allowed in *First National Bank v. Dunham*.⁷¹ In that case, the reprehensible conduct consisted of the defendant's attempts to conceal assets, to make fraudulent conveyances, to persuade a witness to give misleading testimony, to bribe a handwriting expert, and to falsify certain records for trial.⁷²

The foregoing cases illustrate that under the federal bad faith exception an award of attorney's fees is appropriate whenever a party clearly violates the law and in the face of this clear violation obstinately forces the plaintiff to expend time and effort preparing or conducting a lawsuit. Additionally, grounds for an award exist if a plaintiff brings a groundless suit, a defendant asserts a baseless defense, a party poses unnecessary petitions and motions, or a litigant

67. 71 F.R.D. at 694.

68. *Id.*

69. 386 F. Supp. 1177 (D. Minn. 1974).

70. *Id.* at 1193.

71. 471 F.2d 712 (8th Cir. 1973).

72. *Id.* at 713.

generally pursues a course of conduct that is vexatious or oppressive to his opponent.

Safeguards and Guidelines for Applying the Exception

Objections to the federal bad faith exception have been made. If it is abused, the exception could operate to deny a party his right to use the judicial system. It could also operate to deny a party due process by penalizing him if he fails to recover in a suit he brings or if he loses a suit he defends. This denial of a right could occur if the exception is too readily applied, and if the judge, once the jury has found for the plaintiff, forgets that the case raised a very valid issue in the beginning and grants attorney's fees for a defendant's obstinate refusal to concede liability. The exception could also be abused by a plaintiff who makes unreasonable demands for settlement and threatens to seek obstinancy fees if the defendant does not acquiesce.⁷³ Finally, another argument against the exception is that it lacks standards and guidelines by which to measure bad faith.⁷⁴

These criticisms may have merit, but they can be met, by stressing that the federal decisions do provide guidelines in cases in which the federal courts said that the exception should never be mechanically applied. When it is applied, the trial courts should scrupulously adhere to standards and guidelines developed in the many cases.⁷⁵ The standards that provide guidance are first that attorney's fees for bad faith conduct should never be imposed if there is a genuine dispute in a case concerning either the law or the facts. Vigorous litigation in an area in which the law is unsettled should never be held to be in bad faith.⁷⁶ Applying the bad faith exception when there is a genuine dispute would not be consonant with the right in a free society to use the legal process nor with the main purpose of courts — to settle disputes. For example, if there is a genuine controversy as to the facts or the law, mere refusal to settle should never be considered obstinancy.⁷⁷ There must be more. There must be no genuine factual dispute, the law on the subject must be clear, and the right of the plaintiff must be certain.⁷⁸

73. Such conduct on the part of a plaintiff would justify an award of fees against him.

74. See note 132 & accompanying text *infra*.

75. See notes 48-72 & accompanying text *supra*.

76. *Adams v. Carlson*, 521 F.2d 168, 170 (7th Cir. 1975).

77. *Wright v. Jackson*, 522 F.2d 955, 958 (4th Cir. 1975).

78. The objection can be made that under such standards the bad faith exception would apply even to the plaintiff in *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), who brought an action for negligence even though she was contributorily negligent and even though she knew that in California con-

Second, to hold a plaintiff liable for the attorney's fees of the defendant just because he failed to prove his case would also be an abuse of the bad faith exception.⁷⁹ If there is nothing in the record to show that a plaintiff's suit was not a bona fide effort to seek redress or if there is nothing to indicate that it was brought to harass, embarrass, or abuse the defendant, an award of attorney's fees would be improper.⁸⁰

Third, the standard for judging bad faith conduct involving pre-trial motions or motions during trial is also very high. Petitions, motions, and evidentiary objections based on a valid legal foundation are always proper.

Thus, the standards for an award of attorney's fees under the bad faith exception are stringent, and asserting valid claims, advancing serious defenses, and litigating contested facts should never be found to be bad faith.⁸¹ As the district court said in *Tenants and Owners in Opposition to Redevelopment v. United States Department of Housing and Urban Development*: "Vigorous advocacy involves conflict and is a natural and expected by-product of litigation in our judicial system. It is only conduct that clearly goes beyond generally accepted vigor and persistence commonly employed in our adversary system that may be considered in determining whether sanctions should be imposed."⁸²

The exception is used only as a remedy for abuse and unnecessary effort and delay caused by bad faith and obstinacy. Instances of abuse of the exception will be rare, and its misapplication can be reduced to a minimum if judges and litigants make sure the developed standards are carefully applied.

tributory negligence on the part of a plaintiff was a complete bar to recovery. The bad faith exception, however, does not apply to such situations. It only applies when the law is clear and, to borrow a phrase from the ABA Code of Professional Responsibility (§ 7-102(A)(2) (1975)), when the party against whom it operates cannot make a good faith argument for change. Therefore, it cannot be said that the plaintiff in *Li* was guilty of bad faith conduct in filing suit where the law on the subject was over one hundred years old, the trend in other jurisdictions was to do away with contributory negligence as a complete defense, and where a good faith argument for a change in the law could be and was made. It is only in such cases as *Monroe v. Board of Com'rs*, 453 F.2d 259 (6th Cir.), cert. denied, 406 U.S. 945 (1972) and *Gates v. Collier*, 70 F.R.D. 341 (N.D. Miss. 1976), where a party maintains a position in opposition to settled principles of law that have either recently been adopted or reaffirmed by the highest courts of the jurisdiction does the bad faith exception for holding to an unreasonable legal position come into play.

79. *Adams v. Carlson*, 521 F.2d at 170.

80. *Blackburn v. City of Columbus, Ohio*, 60 F.R.D. 197, 198 (S.D. Ohio 1973).

81. *Lipscomb v. Wise*, 399 F. Supp. 782, 800 (N.D. Tex. 1975).

82. 406 F. Supp. 960, 964 (N.D. Cal. 1975).

Attorney's Fees for Bad Faith in Other Jurisdictions

Most states have not adopted the federal bad faith exception, preferring only to recognize the prior litigation and common fund-substantial benefit exceptions. A few jurisdictions, however, most notably Washington, D.C.,⁸³ Pennsylvania, Connecticut, and Indiana, either have recognized the exception⁸⁴ or have considered it favorably in dicta.⁸⁵

Instead of adopting the federal bad faith exception in its entirety some state legislatures have embraced the basic theory behind the exception and have provided remedies for bad faith litigation by statute. The scope of most of these statutes is limited, and they provide for attorney's fees for bad faith only in certain situations arising during litigation.⁸⁶ Only Puerto Rico,⁸⁷ North Dakota,⁸⁸ Illinois,⁸⁹ and Georgia⁹⁰ have statutes that are similar to the federal exception in providing for a general award of fees for bad faith conduct.

Rule 44.4(d) of the Rules of Civil Procedure of the Commonwealth of Puerto Rico provides that "[W]here a party has been obstinate, the court shall in its judgment impose on such person the payment of a sum for attorney's fees."⁹¹ The Puerto Rico courts award attorney's fees under this statute for the purpose of avoiding "court congestion, needless litigation and the delay of the redress of individual rights."⁹² Another goal of the statute is to ensure that the rights of the poor are protected against abuse by more economically advantaged and powerful litigants.⁹³ If the court finds a party to be

83. Because the District of Columbia is under federal control, it is not certain whether this is really an independent adoption of the exception.

84. See 1901 Wyoming Ave. Coop. Ass'n v. Lee, 345 A.2d 456 (D.C. Cir. 1975); F.W. Berens Sales Co. v. McKinney, 310 A.2d 601 (D.C. Cir. 1973); Continental Ins. Co. v. Lynham, 293 A.2d 481 (D.C. Cir. 1972); Saint Joseph's College v. Morrison, Inc., 158 Ind. 272, 302 N.E.2d 865 (1973).

85. Theodore D. Bross Line Constr. Corp. v. Ryan Crane Serv. Corp., 32 Conn. Supp. 181, 345 A.2d 594 (Super Ct. 1975) (dictum); Feist v. Luzerne County Bd. of Assessment Appeals, 22 Pa. Commw. Ct. 181, 347 A.2d 772 (1975).

86. See MICH. G.C.R. 526.7(2) which is substantially the same as FED. R. Civ. P. 56(g).

87. Although Puerto Rico is a U.S. possession, its law on attorney's fees will be considered on the same basis as that of the states. P.R. LAWS ANN. tit. 32, § 44.4(d) (App. II 1969).

88. The North Dakota statute is nearly identical to the Illinois statute. N.D. CENT. CODE § 28-26-31 (Supp. 1974).

89. ILL. ANN. STAT. ch. 110, § 41 (Smith-Hurd Supp. 1977).

90. GA. CODE ANN. § 20-1404 (1965).

91. 32 P.R. LAWS ANN. tit. 32, R. 44.4(d) (App. II 1969).

92. De Thomas v. Delta S.S. Lines, Inc., 58 F.R.D. 335, 346 (D.P.R. 1973).

93. *Id.*

obstinate within the meaning of the statute, the court is bound to impose the prescribed sanctions.⁹⁴

Conduct within the statute's definition of obstinancy includes holding to a meritless position, either with respect to a particular issue or throughout the entire case.⁹⁵ In *De Thomas v. Delta Steamship Lines, Inc.*,⁹⁶ the United States District Court, applying the Puerto Rico statute, held a steamship company responsible for payment of its opponent's attorney's fees because it was obstinate in refusing to admit liability in the face of conclusive evidence of its culpability and because it sought a motion to dismiss on a theory that had been discarded by an earlier Supreme Court case. The court also based the award on the company's persistence in alleging that damages were not recoverable for conscious pain and suffering when Puerto Rico law was clearly to the contrary.⁹⁷

*City Bank of Honolulu v. Rivera Davila*⁹⁸ cites other examples of conduct held to constitute obstinancy within the meaning of the statute. Such conduct includes prolonging a trial by interjecting irrelevancies, refusing to admit facts that are proved to be true beyond all doubt, and making statements and later contradicting them.⁹⁹

The Illinois statute is quite different from that of Puerto Rico. It attempts to regulate the bad faith conduct of litigants at the beginning of the lawsuit in the pleadings stage. Section 41 of the Illinois Civil Practice Act¹⁰⁰ provides that a party making false pleadings will have to pay reasonable attorney's fees and the expenses the other party incurred because of the false pleadings. This statute is remedial and it prevents litigants from being subjected to harassment by lawsuits that are based on false statements and brought without legal or factual foundation.¹⁰¹

The Illinois Court of Appeal applied section 41 in *Elston-Damen Currency Exchange Inc. v. Sheon*,¹⁰² in which the plaintiff's suit was dismissed on the basis of *res judicata*. The court found that the plaintiff had had a trial on the merits which had finally determined the issues, that it had not properly attacked the judgment on direct appeal,

94. *Montaña v. Metro. Const. Corp.*, 87 P.R.R. 35 (1962).

95. *Pan American World Airways, Inc. v. Ramos*, 357 F.2d 341, 342 (1st Cir. 1966).

96. 58 F.R.D. 335 (D.P.R. 1973).

97. *Id.* at 345.

98. 438 F.2d 1367 (1st Cir. 1971).

99. *Id.* at 1371.

100. ILL. ANN. STAT. ch. 110, § 41 (Smith-Hurd Supp. 1977).

101. *Grandys v. Spring Soft Water Conditioning Co.*, 101 Ill. App. 2d 225, 242 N.E.2d 454 (1968).

102. 46 Ill. App. 2d 218, 197 N.E.2d 143 (1964).

and that it had filed the instant case when it knew that the matter could not be relitigated. The court assumed that such conduct on the part of the plaintiff had subjected the defendant to harassment and expense which warranted compensating him for his attorney's fees.¹⁰³

Georgia's bad faith attorney's fees statute¹⁰⁴ makes attorney's fees available only to plaintiffs. Fees may be awarded if a defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense.¹⁰⁵ The statute's scope is further limited in that it has been construed to apply only to the defendant's bad faith conduct which induces litigation.¹⁰⁶ The other two conditions for invocation of the statute, stubborn litigiousness and unnecessary trouble and expense, have been similarly limited to conduct which causes the plaintiff to file an action. Therefore, as interpreted, the statute does not apply to either party's conduct during litigation.

The restrictive application of the Georgia statute is illustrated in *Employer's Liability Assurance Corporation, Ltd. v. Sheftall*.¹⁰⁷ The defendant built a house for the plaintiff in which water leaks were discovered. The plaintiff quickly notified the defendant of the defect. Despite repeated assurances that the leak would be repaired, the defendant failed for over a year to remedy the situation. As a result, the leak caused considerable damage to the house. The court determined that the defendant was under a duty to make the repairs and that his breach of this duty caused plaintiff unnecessary trouble and expense within the meaning of the attorney's fees statute.¹⁰⁸

Although these statutes are based upon the concept that there should be a remedy for bad faith litigation, none of them reaches all of the instances of bad faith conduct included within the proscription of the federal bad faith exception. These statutes are very limited in the help they provide courts in controlling abuse of the legal system and in protecting innocent litigants. The Puerto Rico statute as interpreted applies only to bad faith conduct during litigation. No cases have been found that have applied it to situations in which the defendant's bad faith conduct induces a party to seek redress in the courts. The Illinois statute is limited to penalizing litigants for alleg-

103. *Id.* at 227, 197 N.E.2d at 147.

104. GA. CODE ANN. § 20-1404 (1965): "The expenses of litigation are not generally allowed as a part of the damages; but if the defendant has acted in bad faith, or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them."

105. *Altamaha Convalescent Center, Inc. v. Godwin*, 137 Ga. App. 394, 395, 224 S.E.2d 76, 78 (1976).

106. *Adams v. Cowart*, 224 Ga. 210, 215, 160 S.E.2d 805, 809 (1968).

107. 97 Ga. App. 398, 103 S.E.2d 143 (1958).

108. *Id.* at 405, 103 S.E.2d at 149.

ing untrue matter or alleging matter in bad faith in their pleadings.¹⁰⁹ Like the Puerto Rico statute, it does not apply to bad faith conduct which induces litigation, to obstinacy in holding to a baseless defense, nor to other major abuses of the judicial system.

Finally, the Georgia statute applies only to defendant's conduct inducing litigation. It has no application to a plaintiff or defendant who conducts a lawsuit in bad faith by instituting a vexatious suit, by holding to a baseless defense, or by harassing and demoralizing his or her opponent with a plethora of petitions and motions.

Therefore, from an examination of these three statutes and the authorities of other states, the conclusion is warranted that no jurisdiction has a provision comparable to the federal bad faith exception. No other jurisdiction has a statute or judicially created rule providing a vehicle by which the courts can remedy the effects of bad faith litigation, prevent abuse of one party by the other, and stop general misuse of the judicial system by awarding attorney's fees against those who unnecessarily prolong litigation, harass their opponents and use any means to prevail.

Attorney's Fees for Bad Faith in California

California's general rule as to attorney's fees is embodied in Code of Civil Procedure section 1021. It provides that "[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties"¹¹⁰ Thus, California has codified the general American rule. The California appellate courts have also judicially recognized¹¹¹ the common fund-substantial benefit¹¹² and prior litigation exceptions.¹¹³

The federal bad faith exception has had a long history of acceptance in dicta in California cases. Beginning in 1870 with *Williams*

109. In *Brokaw Hosp. v. Circuit Ct. of McLean County*, 52 Ill. 2d 182, 287 N.E.2d 472 (1972), the court applied the Illinois statute to allegations and denials made in a pre-trial motion to dismiss.

110. CAL. CODE CIV. PROC. § 1021 (West 1955).

111. Although Code of Civil Procedure section 1021 states that the only exceptions to the general rule are those provided by statute, the courts have not recognized this as a limit on their equity powers to fashion exceptions when justice requires. See *D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974), where the court speaks of "equitable nonstatutory" principles upon which to base an award of fees. *Id.* at 25-26, 520 P.2d at 28, 112 Cal. Rptr. at 804.

112. *Fletcher v. A.J. Indus., Inc.*, 266 Cal. App. 2d 313, 13 P.2d 467, 72 Cal. Rptr. 146 (1968).

113. *Prentice v. North Am. Title Guar. Corp.*, 59 Cal. 2d 618, 381 P.2d 645, 30 Cal. Rptr. 821 (1963).

v. MacDougall,¹¹⁴ the California Supreme Court has recognized that attorney's fees might be awarded if a party's conduct has been "contumacious."¹¹⁵

Recently, the California courts have had several occasions to consider whether the federal bad faith exception should be recognized in California. In *Russell v. Carleson*,¹¹⁶ plaintiffs challenged the constitutionality of California Welfare and Institutions Code section 11351.5,¹¹⁷ which requires an adult male living with a welfare family to pay his own living expenses. In seeking an award of attorney's fees, the plaintiffs charged the defendants with defending their actions pursuant to the section although they had full knowledge of its invalidity. The third district court of appeal found the statute to be constitutional, and as a consequence the plaintiffs' request for attorney's fees was found to be without merit.¹¹⁸ However, in dictum the court added that there was no evidence of bad faith on the part of the defendants and no findings of bad faith. Therefore, subsequent to *Russell* it was arguable that if faced with a proper case on its facts, the third district might have applied the federal bad faith exception.

In 1974 the Supreme Court of California had the opportunity in *D'Amico v. Board of Medical Examiners*¹¹⁹ to review the law in California with regard to attorney's fees. The court, in an opinion by Justice Sullivan, cited Code of Civil Procedure section 1021¹²⁰ for the general rule and reaffirmed the existence of the judicially created common fund-substantial benefit exception,¹²¹ although that exception did not apply to the facts of the case. The court then observed that any other basis for awarding attorney's fees would require recognition of a new equitable nonstatutory principle.¹²² The court addressed the plaintiff's argument that the defendants' conduct during the litigation had been "indefensible" and therefore justified an award of attorney's fees for the plaintiffs under the federal bad faith exception. The supreme court, in declining to reach the plaintiff's argument to award fees on the basis of bad faith, stated:

Thus, even assuming that a California court in a case of this nature may in its discretion award attorney's fees to one party as a sanction for vexatious and oppressive conduct on the part of another party or its counsel (a matter which we are not required to, and

114. 39 Cal. 80 (1870).

115. *Id.* at 85.

116. 36 Cal. App. 3d 334, 111 Cal. Rptr. 497 (3d Dist. 1973).

117. CAL. WELF. & INST. CODE § 11351.5 (West 1972).

118. 36 Cal. App. 3d at 348, 111 Cal. Rptr. at 506.

119. 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974).

120. CAL. CODE CIV. PROC. § 1021 (West 1955).

121. 11 Cal. 3d at 25, 520 P.2d at 27-28, 112 Cal. Rptr. at 803-04.

122. *Id.* at 25-26, 520 P.2d at 28, 112 Cal. Rptr. at 804.

do not, decide today), it appears that the trial court did exercise its discretion on that basis and did determine that a prior monetary sanction was sufficient¹²³

After *D'Amico* was decided, *Douglas v. Los Angeles Herald-Examiner*¹²⁴ came down from the second district. In that case a newspaper reporter brought a suit for indemnity against his employer and sought attorney's fees in that suit under the bad faith exception. To support his claim, the plaintiff argued that the Supreme Court in *D'Amico* "hinted" that the power to award fees for bad faith conduct existed in California courts but that the court required a proper fact situation before deciding whether to include the federal equitable exception in California law.¹²⁵ This court also avoided the issue, saying that even though the California Supreme Court may on a proper day and in a proper case decide to adopt the federal bad faith exception, it had not yet done so and that this occasion presented neither the case nor the day for adoption of the federal equitable rule.¹²⁶

Young v. Redman and Rejection of the Exception

The combination of favorable dicta¹²⁷ and the California Supreme Court's evasion of the issue¹²⁸ left matters in an uncertain state until the second district court of appeal finally squarely faced the issue in *Young v. Redman*.¹²⁹ Young had entered into a contract to sell land to Redman. Later, Redman sought to rescind on grounds of mistake and misrepresentation. Young sued for breach of contract, and Redman cross-complained for fraud. The lower court, in finding for Young, awarded him one thousand dollars in attorney's fees as sanctions because of Redman's failure to appear when subpoenaed, because of his completely unmeritorious cross-complaints and defenses, and because of his vexatious and oppressive conduct in maintaining, in bad faith, unfounded defenses and cross-actions.¹³⁰

The *Redman* court in deciding whether the lower court had properly awarded fees as sanctions first stated that there was no clear authority in California for awarding attorney's fees under the rationale of the federal bad faith exception because there existed no statutory

123. *Id.* at 27, 520 P.2d at 29, 112 Cal. Rptr. at 805. The lower court had awarded \$750 for attorney's fees as discovery sanctions. *Id.* at 10, 520 P.2d at 17, 112 Cal. Rptr. at 793.

124. 50 Cal. App. 3d 449, 123 Cal. Rptr. 683 (2d Dist. 1975).

125. *Id.* at 468-69, 123 Cal. Rptr. at 695.

126. *Id.* at 469, 123 Cal. Rptr. at 695.

127. *Russell v. Carleson*, 36 Cal. App. 3d 334, 111 Cal. Rptr. 497 (3d Dist. 1973).

128. *D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974).

129. 55 Cal. App. 3d 827, 128 Cal. Rptr. 86 (2d Dist. 1976).

130. *Id.* at 830, 128 Cal. Rptr. at 88.

provision and all reference to it had been dicta. The court then discussed the merits of such a rule, noting that such fee-shifting could help deter bad faith litigation, reduce "the burning up of valuable court time in handling frivolous, 'bad faith' matters devoid of merit and make whole litigants who were forced to expend money on legal fees to meet such unfounded positions."¹³¹

Despite its assessment that the exception would be a boon to litigants who become victims of bad faith conduct and to the administration of the California courts, the second district refused to adopt it. The court reasoned that such a rule would expand the power of the lower courts and that such expansion was the responsibility of the legislature. The court cautioned that such a power in the lower courts without appropriate safeguards and guidelines could lead to abuse and to a proliferation of appeals.¹³²

After discussing all of the reasons why it would not adopt the federal bad faith exception, the *Redman* court, at the very end of the opinion, changed its reasons for disallowing the one thousand dollar sanction. Noting that "Code of Civil Procedure section 1021 provides that attorney fees are 'left to the agreement, express or implied, of the parties' *except* as specifically provided by statute,"¹³³ the court found section 1992 of the Code of Civil Procedure¹³⁴ to be just such a statute. Section 1992 provided for sanctions of one hundred dollars when a witness failed to appear when subpoenaed. The court held that this statute covered the fact situation before it because *Redman* had failed to appear when subpoenaed. It therefore remanded the case to the trial court to reconsider the question of sanctions in accordance with section 1992.

From this holding, the conclusion can be drawn that the court considered the bad faith exception unnecessary because there existed an applicable statute. A strong argument can be made that this last part of the *Redman* opinion transforms the court's whole discussion of the bad faith exception into dicta. However, because the court went to such lengths to repudiate the exception, a rebuttal of its reasons for rejection and a discussion of why the exception should be adopted in California is needed.

Adoption of the Bad Faith Exception in California

The court's reasons in *Young v. Redman* for refusing to adopt the federal bad faith exception are without legal foundation. First, it

131. *Id.* at 838, 128 Cal. Rptr. at 93.

132. *Id.* at 838-39, 129 Cal. Rptr. at 93.

133. *Id.* at 839, 128 Cal. Rptr. at 94.

134. CAL. CODE CIV. PROC. § 1992 (West 1955).

would be unnecessary for the legislature to act to create such a power in California's lower courts. The power to award attorney's fees for bad faith conduct is a power the superior courts of California already possess because it is a power inherent in a court of equity. They have the same equity powers as the courts of the federal system in that they both possess full equity jurisdiction.¹³⁵

Such equitable power is apparent in the fact that the appellate courts of California have fashioned another exception to the general rule, the common fund-substantial benefit exception.¹³⁶ Furthermore, in adopting this rule, the California courts followed federal precedent. The common fund aspect of this exception was first recognized by the United States Supreme Court in *Trustees v. Greenough*,¹³⁷ and in 1895 the California Supreme Court followed suit in *Fox v. Hale & Norcross Silver Mining Co.*¹³⁸ *Sprague v. Ticonic National Bank*¹³⁹ extended the exception in federal cases to allow for attorney's fees if a substantial benefit was bestowed on nonparties, and this case was cited as authority when California adopted this part of the exception in *Fletcher v. A.J. Industries, Inc.*¹⁴⁰

Second, the court's perception of a need for guidelines and safeguards from the legislature is not a valid reason to reject the exception and deny the court's power to apply it if circumstances warrant. The exception has been a viable part of the law in the federal system for years.¹⁴¹ Its standards have been carefully developed and applied in numerous cases.¹⁴² A superior court choosing to exercise its inherent equitable powers in a given situation would have no trouble finding guidance in the myriad of federal cases applying the exception.

Also, the task of exercising discretion in determining whether the sanction is warranted is an appropriate one for the courts. It is a role the courts currently play under certain California statutes that allow attorney's fees for bad faith.¹⁴³ The only difference would be that under the federal bad faith exception the courts would be applying a judicially created rule in the exercise of their equity powers —

135. *Olcese v. Justice's Ct.*, 156 Cal. 82, 85, 103 P. 317, 318 (1909). Municipal courts and justice courts have equity jurisdiction in only certain specified situations. See CAL. CODE CIV. PROC. § 86 (West Supp. 1977). Any extension of the exception to these latter courts would have to be done by statute or judicial construction of their already existing equity powers.

136. See note 112 & accompanying text *supra*.

137. 105 U.S. 527 (1881).

138. 108 Cal. 475, 41 P. 328 (1895).

139. 307 U.S. 161 (1939).

140. 266 Cal. App. 2d 313, 72 Cal. Rptr. 146 (1st Dist. 1968).

141. See notes 30-35 & accompanying text *supra*.

142. See notes 48-73 & accompanying text *supra*.

143. See notes 144-47 & accompanying text *infra*.

a rule designed to apply to all facets of the judicial process and not just to particular situations.

Finally, while a proliferation of appeals might be troublesome initially, the burden on the appellate courts would be a temporary one. As the courts become familiar with the case law developed in the federal system and the case law which would develop in California's appellate courts, the need for appellate review would decrease.

After recognizing that they have the power to adopt the federal bad faith exception under their equity powers, the California courts should choose to exercise their powers in this instance for several compelling reasons. First, existing provisions allowing attorney's fees for bad faith do not provide adequate protection against such litigation and the consequent abuse of the judicial system. Recently enacted Government Code section 800¹⁴⁴ authorizes the recovery of attorney's fees in an action to review an administrative proceeding if a public entity has acted arbitrarily or capriciously. Code of Civil Procedure section 396b¹⁴⁵ allows an award if suit was filed in a court without venue, if the choice of venue was not made in good faith, or if proper venue was challenged in bad faith. The summary judgment statute¹⁴⁶ also has a provision for bad faith fees as do the various California discovery statutes.¹⁴⁷

These existing provisions allowing awards against bad faith conduct in specific situations do not provide the courts with enough power in controlling the conduct of those who invoke their jurisdiction. No statute or rule of judicial decision presently gives the lower courts the power to discourage wholly unfounded and vexatious actions and defenses. Government Code section 800¹⁴⁸ applies only to the bad faith conduct of officials and administrative bodies. It does not apply to the individual who, aware of his clear liability, stubbornly refuses

144. CAL. GOV'T CODE § 800 (West Supp. 1977). The pertinent parts of the statute read: "In any civil action to appeal or review the award, finding, or other determination of any administrative proceeding . . . where it is shown that the award, finding, or other determination of such proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his official capacity, the complainant if he prevails in the civil action may collect reasonable attorney's fees, but not to exceed . . . (\$1,500), where he is personally obligated to pay such fees, from such public entity"

145. CAL. CODE CIV. PROC. § 396b (West Supp. 1977). The attorney is specifically held responsible for fees under this statute. In *Metzger v. Silverman*, 62 Cal. App. 3d Supp. 30, 133 Cal. Rptr. 355 (1976), the court construed the good faith mentioned in the statute as "that state of mind denoting honesty of purpose, freedom from intention to defraud, and . . . being faithful to one's duty or obligation." *Id.* at 38, 133 Cal. Rptr. at 361.

146. CAL. CODE CIV. PROC. § 437c (West Supp. 1977).

147. CAL. CODE CIV. PROC. §§ 2019, 2034 (West Supp. 1977).

148. CAL. GOV'T CODE § 800 (West Supp. 1977).

to conciliate and forces his opponent to seek redress in the courts. Section 396b,¹⁴⁹ allowing a motion for change of venue, along with the discovery provisions and the summary judgment statute, encompass only four of the many motions¹⁵⁰ that may be used under California law to inundate a party and to drive up his costs in order to force him into an unfair settlement. The federal bad faith exception applies to all bad faith conduct occurring any time prior to filing, if that conduct induces the litigation, and to bad faith conduct occurring during litigation. Therefore, the federal exception covers situations for which sanctions are appropriate even though the conduct does not come totally within the purview of the aforementioned statutes.¹⁵¹

The second significant reason for adopting the bad faith exception in California is that it would help to rid California's trial courts of bad faith litigation while compensating the parties subjected to the abuse. Awards for engaging in contumacious conduct, bringing vexatious suits, and maintaining baseless defenses, would help deter such abuses of the judicial process. Also, the practice of using petitions and motions to harass the other party or to increase his costs by unduly protracting the litigation would be deterred.¹⁵² Such a sanction would cause all parties to weigh carefully their contemplated motions and conduct and impress upon litigants the fact that bad faith litigation costs money — money they will have to pay.

Under the exception, however, all facets of the adversary system as ideally envisioned would be preserved. Only those suspect practices developed to harass an opponent would be deterred by a system of awarding attorney's fees against those who engage in proscribed conduct.¹⁵³ Only calculated and purposeful abuse would be discour-

149. CAL. CODE CIV. PROC. § 396b (West Supp. 1977).

150. See, e.g., CAL. CODE CIV. PROC. § 418.10 (West 1973) (motion to quash summons; motion to stay or dismiss for inconvenient forum); CAL. CODE CIV. PROC. § 430.10 (West Supp. 1977) (special demurrer for lack of subject matter jurisdiction; lack of capacity; another action pending; misjoinder of parties; no cause of action stated; uncertain pleading; no written contract pleaded); CAL. CODE CIV. PROC. § 453 (West 1973) (amendments to pleadings, motion for continuance); CAL. CODE CIV. PROC. § 581 (West 1976) (motion to dismiss).

151. By its adoption of these few statutes providing for "bad faith" fees, arguably the legislature has recognized the need for sanctions against vexatious litigation.

152. A situation warranting an award to the plaintiff occurs, for example, if each time a plaintiff refuses in good faith to settle, the defendant files a motion to dismiss, citing authorities and presenting arguments raised in previous motions in the same suit or in similar suits.

153. Although the focus of this Note is the responsibility of *parties* for attorney's fees for engaging in bad faith conduct, a related issue is the culpability of the party's lawyer who engages in bad faith conduct. Probably more often than not, the attorney is the one who engages in or encourages a party to engage in bad faith conduct. Although no case has been found where attorney's fees for bad faith conduct were

aged; a culpable party would be charged with the excess costs incurred because of bad faith or with the other party's entire costs of counsel if such conduct pervades the whole lawsuit.

Finally, adoption of the exception would foster efficiency in the judicial system. As recognized in *Redman*, the power to award fees

specifically awarded against the offending party's lawyer, because of the equitable nature of the exception, there should be no impediment to such a practice. In fact, if bad faith conduct were the result of the machinations of a party's lawyer, equity might require that the offending attorney pay the bad faith fees. If a party were adjudged liable for his opponent's fees because of the contemptuous conduct of his lawyer, a cause of action for malpractice would conceivably lie.

Vigorous advocacy on behalf of a client is expected of a lawyer. Canon 7 of the ABA Code of Professional Responsibility requires that a lawyer represent his client zealously within the bounds of the law. An argument could be made that such penalties as provided by the bad faith exception might discourage the lawyer from carrying out his ethical duty to represent his client zealously. Canon 7 requires that this zealous pursuit be conducted within the bounds of the law, and conduct falling within the federal bad faith exception is not "within the bounds of the law." Furthermore, the disciplinary rules promulgated with Canon 7 subject a lawyer who violates his obligation to the courts by engaging in bad faith conduct to professional discipline. Thus, a lawyer may cooperate with opposing counsel when to do so would not prejudice the rights of his client. He must further avoid the use of offensive tactics during litigation. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 7, DR 7-101(A)(1) (1976). More specifically, a lawyer is subject to professional discipline if he files a suit, asserts a position, conducts a defense, delays a trial, or takes other action on behalf of his client which he knows or should know would harass or injure another. *Id.* at DR 7-102(A)(1). An attorney must also not advance a claim or defense that he knows is unwarranted under existing law and which cannot be supported by a good faith argument for the law's extension, modification, or reversal. *Id.* at DR 7-102(A)(2). Further, discipline is in order if the lawyer counsels or assists his client in fraudulent conduct, conceals evidence, or makes false statements. *Id.* at DR 7-102(A)(3),(5),(7). The Code also prohibits an attorney from alluding to any matter during trial that he has no reasonable grounds to believe is relevant to the case or supported by admissible evidence, and from asking questions which are intended to degrade a witness or another person when he has no reasonable basis for believing they are relevant to the case. *Id.* at DR 7-106(C)(1),(2).

Because these disciplinary rules provide for sanctions against attorneys who engage in bad faith conduct, the argument could be made that the bad faith exception is unnecessary. However, the Code is not a sufficient safeguard to deter bad faith litigation in view of the infrequency with which the rules are invoked to discipline attorneys. Out of over 45,000 lawyers in California in 1976, only 97 were disciplined. Compiled from STATE BAR OF CAL. REP. Jan.-Dec. 1976. The bad faith exception under which parties and possibly even attorneys are held liable for fees serves to deter bad faith litigation more effectively than the Code because of the immediate and pecuniary nature of the penalty. Also, the Code restricts the attorney's behavior, not the client's. If a client realized that he would be liable for the other side's fees, this potential liability could act as a deterrent to the client. Moreover, if the exception were not adopted, the innocent party harmed by such bad faith conduct would be left without compensation. In short, adoption of the exception would provide the courts with a more effective way to deter bad faith conduct of both attorneys and clients while providing justice to innocent parties.

for bad faith litigation would serve to reduce the number of civil suits filed. The reduction would occur because the possibility of having to pay the attorney's fees of the opponents, in addition to their own, would cause plaintiffs to think twice before filing lawsuits that should not be filed and cause defendants to think twice before defending actions that should not be defended.

Even if such suits were filed, the incidents of settlement may also increase because under the exception there may be liability for pursuing vexatious suits and maintaining baseless defenses. Those litigants reaching the trial court level would be encouraged to minimize their opponents' expenses by foregoing unnecessary motions and evidentiary battles. Thus, valuable court time could be conserved for more pressing matters.

Although every person has a right to use the judicial process to settle his disputes, no one has a right to abuse the judicial system even in the name of vigorous adversary litigation. Although our judicial system must encourage the just claim and the just defense, it need not do so by countenancing abuse and inefficiency. The wise employment of the bad faith exception by California's trial courts will help control the conduct of litigants, deter frivolous bad faith litigation, compensate parties subjected to abuse, and streamline the judicial system. Therefore, the many reasons for adoption of the exception, the fact that the California courts have the power to adopt the exception, and the fact that the appellate courts have followed federal law in adopting another exception to the American rule mandate the judicial adoption of the federal exception in California.

Conclusion

The federal courts have developed the bad faith exception to the general American rule disallowing attorney's fees. This federal bad faith exception has not been widely followed by the states. Illinois, Puerto Rico, and Georgia have statutes that are similar to the exception and are based on the same policy considerations that lie behind it, but none is as broad in scope as the federal rule. California has a history of acceptance of the exception in dicta, but recently the Second District Court of Appeal in *Young v. Redman* refused to adopt the federal rule, preferring instead to leave this task to the legislature. Legislative action, however, is unnecessary because the superior courts of California, as courts of general jurisdiction, have the inherent powers of courts of equity to apply the exception and in their discretion allow attorney's fees for bad faith. If this power were exercised, any guidelines and safeguards needed for application could be found in the already numerous federal cases interpreting the rule. Moreover, the

federal bad faith exception should be recognized in California to promote the interests of fairness and judicial economy, to prevent needless lawsuits, to encourage conciliation, and to promote the proper use of the judicial system.

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